No. 94-99

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 1994

KINGO KAWAOKA and TATSUMI KAWAOKA,,

Petitioners,

vs.

THE CITY OF ARROYO GRANDE; THE CITY COUNCIL OF ARROYO GRANDE; MARK M. MILLIS; B'ANN SMITH; GENE MOOTS; A. K. DOUGALL; and DORIS OLSEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the City of Arroyo Grande's ("City") general plan, which allows petitioners ("landowners") to develop approximately 83 single-family residences on their 35-acre strawberry farm, provided they apply for a specific plan under California law and development approvals, work a taking of the land?

2. Did the lower courts err in rejecting the substantive due process claim by:

a. Finding the alleged impact of the general plan insufficient to violate due process standards;

b. Finding no legally cognizable evidence of improper motivation or discriminatory purpose;

c. Finding that the "as applied" substantive due process claims were not ripe for judicial review?

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STATEMENT OF JURISDICTION

The Court lacks subject matter jurisdiction over the "taking" claim. *Williamson County Regional Planning Comm. v. Hamilton Bank*, 473 U.S. 172, 194-196, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). This claim was never raised in the proceedings below. Federal courts have no jurisdiction over a taking claim because the landowners never sought "just compensation" through available state

procedures. The claim is therefore not ripe for federal court review. *Williamson County*, 473 U.S. 172, 194-196.

The courts below correctly held that the "as applied" substantive due process claims are premature because the landowner never applied for any development approvals available under the state and local procedures. 17 F.3d at 1232-1233; 796 F.Supp at 1235. The lack of a "final decision" regarding the application of the general plan to the property precludes federal review. *Williamson County*, 473 U.S. 172, 199-200; *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987), *cert. den.* 494 U.S. 1043; *Landmark Land Company v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989).

Landowners have abandoned their equal protection claim. The only claim over which the Court has jurisdiction is the claim that the City's general plan on its face violates substantive due process. 17 F.3d at 1233-1238.

STATEMENT OF THE FACTS AND THE CASE

Despite the recitation of "facts" (many of them not appearing anywhere in the record) presented by landowners, this is not a case about reparations for injustices done Japanese-American citizens during World War II. This is a case about land use planning, and not a particularly unusual one at that. An objective account of relevant facts is stated below. Specific rebuttal to factual misstatements and distortions by landowners is made in part B of the statement of facts.

A. The Legally Relevant Facts - The Challenged General Plan.

The subject property, 35 acres of land within the boundaries of the City of Arroyo Grande is owned by a family trust. Kingo Kawaoka (now deceased) farmed the land, primarily growing strawberries, since first purchasing it in 1954. The land is now leased to a tenant who continues to grow strawberries on it. Landowners also lived and raised their family in a home on the property. Their business affairs are now managed primarily by Craig Kawaoka, the family's senior son.

In the late 1980's landowners experienced losses on their farming operations. They blamed the encroachment of urban development surrounding their property, which they said restricted their ability to use pesticides and fungicides they believed necessary for the relatively chemical-intensive business of strawberry production. The record does not disclose whether other factors, such as fluctuations in the notoriously fickle strawberry market, poor management decisions or the historic California drought occurring during this period may have been the true cause of their losses. Notwithstanding the alleged problems, the property was fumigated to prepare for strawberry planting at least once after this lawsuit was filed, and agricultural activities continue. Petitioner's appendix, pp. 66-67.

Feeling that farming was no longer profitable, and with Kingo Kawaoka approaching his 80's, the family decided to attempt to sell the land for development. They found a potential buyer who agreed to pay $6,000,000 if the land were rezoned for relatively high density (5 units per acre) single-family residential development. The land

was zoned at the time for commercial or light industrial uses (a classification which also permitted agriculture).

Landowners engaged a consultant to assist them in obtaining a rezoning. The consultant, Bertram Johnson, quickly discovered that he could not, in his own words, "make a deal" with City officials as was his apparent expectation, for the necessary rezoning and subdivision approvals through informal back-room negotiations. Formal development applications were required. Johnson and landowners, however, also discovered that the City was in the process of updating its city-wide general plan. Their efforts then turned towards influencing the general plan process to achieve their goals.

The lengthy process of updating the City's general plan began in 1988 and proceeded through environmental review and innumerable public workshops and hearings for over almost three years. The draft general plan presented to the City Council in 1990 stated these basic objectives for the City:

"It is the fundamental goal of the City of Arroyo Grande to achieve a community which:

* Promotes a rural, small town atmosphere and retains Arroyo Grande's traditional ties to agriculture.
* Recognizes limitations upon the natural resources necessary to support urban and rural development, and lives within those limits.
* Accommodates a balance and variety of urban and rural lifestyles,

> providing the best possible quality of life for all residents."

Consistent with these overriding objectives, the draft general plan proposed to designate landowners' property and three adjoining parcels, which together constitute 55 acres of active farming within the City, for continued agricultural use. The general plan also recognized, however, that agricultural uses might not remain viable on these properties in the long term. Policy 1.5 of the draft general plan therefore specifically provided that, upon it being demonstrated that agriculture is no longer economically viable, the properties could be converted to residential and commercial uses. 17 F.3d at 1229-1230. Policy 1.5 also required that, prior to conversion, a specific plan to guide development of all four properties be prepared pursuant to California Government Code Sections 65450-65457. *Id.* at 1230.

At several of the numerous public hearings held on the proposed general plan before the City Planning Commission and City Council, Craig Kawaoka and Bertram Johnson appeared and objected to the agricultural designation of landowners' property. Johnson demanded that the property instead be immediately designated for single-family residential development. As evidence that farming was no longer viable, Johnson presented records of landowners' several recent bad economic years and letters from several sources regarding problems with continued use of agricultural chemicals on the site. While the evidence was less than compelling, the City Council agreed to immediately designate the entire 55 acres for residential and commercial development. Consistent with Policy 1.5, "single family residential" development of up

to 4.5 units per acre was permitted on the southern portion of the property. "Rural residential" development of 1.0 units per acre was permitted on the northern half. 17 F.3d at 1230. The adjoining parcels were given similar land use designations. The basis for these designations is fully explained in the declaration of Lloyd Zola, the City's general plan consultant, filed in the proceedings below and attached as an appendix to this brief. These land use designations together permitted development of approximately 83 units on landowners' 35 acres. Over Johnson's objections, the specific plan requirement was retained by the City Council for all four parcels.

Partial success did not satisfy landowners. Their potential buyer reduced his offer from $6,000,000 to $3,735,000 and then withdrew it altogether. 17 F.3d at 1231. Landowners filed this suit in August 1990 claiming that the specific plan requirement denied them due process and equal protection, and that the City's actions were racially motivated. Landowners also complained of an emergency "water moratorium" ordinance enacted by the City Council at the same time as the general plan amendment. The ordinance temporarily (initially for 45 days and then for a full year) suspended processing of new subdivision applications while the City studied its growing water supply problem. During the litigation (without, however, amending the complaint) landowners added objections to the "rural residential" density restrictions imposed on part of their property. 17 F.3d at 1236; 796 F.Supp. at 1397. Neither landowners' original nor amended complaint alleged any "taking" of property in violation of the Fifth Amendment's "just compensation clause". Landowners' counsel below apparently recog-

nized that such claims were barred by *Williamson County*, 473 U.S. 172, 194-196.

After extensive discovery, the case proceeded to summary judgment. The City submitted portions of the administrative record and lengthy declarations from its planning consultant, Lloyd Zola, and various City representatives setting out the basis for its planning policies and decisions. Landowners submitted opposing evidence massive in bulk, but largely devoid of content.

As the sole substantive evidence of racial discrimination, landowners presented declarations asserting that former City Council member, Doris Olsen (now deceased), had made a racially tinged statement ("Why should these Japanese people make all that money?") in two private conversations to landowners' real estate agents near the time of the general plan hearings. One of the declarants testified in deposition that the statement was surprising and entirely out of character for Ms. Olsen. The district court found Olsen's alleged statements "unsophisticated and insensitive, but also ambiguous at best as evidence of racial animus. 796 F.Supp at 1330. The Court of Appeals considered the statements "deplorable," but also clearly insufficient, standing alone, to support a claim of racism on the part of the entire City Council. 17 F.3d at 1239. All of landowners' witnesses (including Craig Kawaoka) were unanimous that they personally had never heard or seen any evidence of racial animus by any City official. Landowners' only other "evidence" of racial animus consists of a report by Craig Kawaoka of an alleged conversation in which another Japanese American landowner speculated that racism might have been the reason that the City attempted to

impose conditions he found objectionable upon the development of his property. The courts below found such evidence unconvincing. 17 F.3d at 1239-1240; 796 F.Supp. at 1331.

As to other evidence of improper motives, landowners offered only speculation and opinions as to the City's alleged anti-development bias, and a single alleged remark by one city staff person to the effect that water and sewage constraints were being used as a "pretext" to limit development. Landowners did not submit any evidence at all to counter the City's documentation showing that existing city water supplies were in fact grossly insufficient to support the levels of development projected by the general plan. The courts below not only found landowners' evidence insufficient to raise any triable issue, but also noted that the City's goal of limiting development for reasons stated in the general plan is manifestly a legitimate exercise of the City's police power. 17 F.3d at 1236-1237; 796 F.Supp. 1325-1326.

B. Disputed Contentions And Facts Misstated In The Petition For Certiorari.

Pursuant to Rule 15.1, the City notes the following factual and legal matters stated in the petition for certiorari which are misstated, unsupported by the record or subject to substantial dispute. It should be noted that the City made timely evidentiary objections in the trial court to much of the "evidence" relied on by landowners. The district court did not rule on these objections, but instead found that landowners had failed to raise any triable issue even if such "evidence" was considered. Landowners had

thus already received more than the benefit of a doubt on their claims.

1. Viability of agriculture on landowners' land.

Landowners repeatedly assert that the economic infeasibility of continued agricultural use of the land, at least for growing strawberries, has been proven. Actually, the record contains no substantive evidence on this point. The courts below simply assumed that continued agricultural use was economically not feasible, based on the City's own willingness to immediately redesignate the land for residential use. Landowners have allegedly suffered losses in their attempt to continue strawberry growing in recent years. Whether this is the result of permanently changed conditions or of other factors, such as market fluctuations, the loss of Kingo Kawaoka's personal management expertise, bad weather or other conditions is open for debate.

2. Alleged inability to file a specific plan.

Landowners also claim that it was legally impossible to pursue a specific plan application for approximately one year after enactment of the City's amended general plan, because formal regulations for processing of specific plans were not adopted by the City until May, 1991. During this period the City's zoning code was comprehensively revised to implement the new general plan. Landowners contend that the land had no "economically viable use" during this period because potential development was foreclosed by the absence of formal specific plan procedures. The courts below appear to have accepted

landowners' contention on this point for the sake of argument, but found that such periods of delay, even if proven, did not render the City's actions unconstitutional or excuse landowners from actually applying for specific plan approval once the City's regulations were adopted. 17 F.3d at 1232-1233 and 1235; 796 F.Supp. at 1325.

Contrary to landowners' apparent contentions, the California statutes which authorize specific plans do not require local agencies to enact special implementing regulations before reviewing a proposed specific plan. The basic requirements for specific plans are contained in the state statutes themselves. See California Government Code sections 65450, *et seq.* Had landowners or some other party interested in developing the property seriously proposed a specific plan immediately following adoption of the revised general plan, such a proposal could have and would have been given full consideration. As it is, landowners' representatives admitted on the record that the family did not ever seriously intend to propose a specific plan but merely regarded the specific plan requirement as an impediment to sale of the property for the price they desired.

3. Alleged denial of "all economically viable use".

Landowners repeatedly assert they were denied of all "economically viable" or "economically beneficial" use of the property for at least some period of time. In fact, the record (as already noted above) shows that the family continued to farm the land, or lease it for farming, and also to live on the land throughout the litigation. In addition, the record contains appraisals prepared by landowners' own appraiser which show that the land

retained a market value of $2,400,000 even with the mild density restrictions and specific plan requirement. 17 F.3d at 1235-1236. Although landowners complained below that the property could not be sold at any price, the evidence showed that landowners actually ceased efforts to list or advertise the property after the general plan was enacted, and instructed the family's broker not to accept any offers less than $6,000,000. 796 F.Supp. at 1324. There is no factual basis for any claim of total, or even severe, loss of use or loss of value of the land.

4. Evidence of Racial Prejudice.

The petition refers to "evidence that the respondent decisionmakers were motivated by . . . race prejudice against persons of Japanese ancestry." Petition, p. 9. In fact, the courts below found that only one council-member had made an arguably racially motivated statement in private. The lower courts correctly concluded that this provided no basis for attributing racial motives to the City Council as a whole. In actual fact, landowners' witnesses were unanimous in testifying in depositions that none had ever heard, or even heard of, any arguably racial remark or other evidence of racism by any public official other than Doris Olsen.[1] Landowners' continued references to alleged racial motivation, even after they have abandoned their equal protection claim, can be

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[1] With respect to Ms. Olsen, a highly respected citizen, social activist and early female career journalist, the City remains convinced that Ms. Olsen never made the remarks attributed to her by landowners' real estate agent. There is substantial evidence in the record that Ms. Olsen *never* harbored the slightest animosity toward anyone based on racial considerations.

assessed only as a tasteless emotional gambit, not a legitimate legal argument. Landowners' further attempt to characterize the City's policies favoring agriculture as a "city-dwellers'" ploy to "depriv[e] Japanese American families of the economically beneficial use of their land," petition, p. 9, warrants no response.

5. The "Pretextual" Water Shortage.

Landowners contend that proposed residential development of their property would utilize less water than currently used to irrigate strawberries. From this they reason that the density restrictions and application of the temporary "water moratorium" to their parcel were arbitrary and a mere "pretext to block development." Petition, p. 7. The Court of Appeals found this issue at best a side-show because the property could not be developed without a specific plan, and no such plan was ever proposed. The one-year water moratorium had no actual impact on landowners. 17 F.3d at 1237.

The courts below also correctly noted that the City's evidence of a pending city-wide water shortage was in fact entirely unrebutted. 17 F.3d at 1237-1238. Landowners' irrigation water is pumped from the same common supply, an overdrafted groundwater basin, that other landowners in the City also depend upon. As the Court of Appeals noted, the City could, and indeed should, rationally take into account the water needs of the entire City, rather than merely the needs of landowners' parcel, in conducting its general planning. 17 F.3d 1238. The density restrictions on landowners' parcel were also enacted for additional reasons beyond water conservation, *i.e.*, concerns over traffic and a desire to preserve some

semblance of the City's historic character. 17 F.3d at 1236; 796 F.Supp. at 1326.

SUMMARY OF ARGUMENT

The "taking" argument was never raised below. This Court lacks subject matter jurisdiction over the claim because landowners never sought "just compensation" for the alleged taking through available state court procedures. *Williamson County*, 473 U.S. 172, 194-196; *Gamble v. Eau Claire County*, 5 F.3d 285, 286 (7th Cir. 1993); *Southern Pacific*, 922 F.2d 498, 502-503; *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574-1575 (11th Cir. 1989). The taking claim is also utterly without merit. The City's general plan permits substantial use of the property (approximately 83 residential units). The plan has not interfered with present use (agriculture) or unreasonably reduced the value of the property ($2,400,000 with the general plan designation).

The substantive due process claims are also entirely without merit. The courts below fully considered landowners' claims of improper or "pretextual" motives and excessive economic impacts. The lower courts simply found no factual basis for attributing false motives to the City, and found the alleged economic detriment well within the range normally associated with zoning and planning restrictions. Landowners simply failed to provide any substantial evidence to support a substantive due process claim under the standards applied by federal courts. The lower courts also correctly found that landowners' "as applied" substantive due process claims were not ripe because landowners had never made any effort to file applications for development of the property.

ARGUMENT

I.

THE COURT LACKS JURISDICTION OVER LANDOWNERS' "TAKING" CLAIM WHICH WAS NEVER RAISED BELOW AND IS ENTIRELY WITHOUT MERIT.

Grant of certiorari on landowners' first and main issue is patently inappropriate for two reasons;

(1) the "takings" issue was not raised below;

(2) the Court lacks subject matter jurisdiction over this claim because landowners never sought or were denied "just compensation" in state courts. *Williamson County*, 473 U.S. 172, 194-196.

Even were this Court inclined to consider the "merits," such as they are, this case involves no important issues of takings law; it is nothing more than a garden variety land use planning dispute. The City's general plan permits approximately 83 residential units on the 35 acre parcel. *Cf. Agins v. Tiburon*, 447 U.S. 255, 262 (1980), 100 S.Ct. 2138, 65 L.Ed.2d 106 [open space zoning limiting development to 1-5 units per 5 acres not a taking]. If landowners wish to sell, their own appraiser calculated the market value of the land, as restricted, at $2,400,000. This is hardly the kind of situation in which the "justice and fairness" commanded by the Fifth Amendment dictates that these landowners be rewarded at public expense. *Penn Central Transportation Co. v.*

New York City, 438 U.S. 104, 124 (1978), 98 S.Ct. 2646, 57 L.Ed.2d 631.

A. Landowners' "Taking" Claim Is Not Ripe For Review Because They Never Sought "Just Compensation" Through State Courts.

Landowners acknowledge that their counsel below decided "not to specifically allege a 'taking'," and that the courts below "held categorically 'that this is not a takings case.'" Petition for certiorari, pp. 13, 11.[2] Even this is a bit of an understatement. Landowners not only never even pled or argued any taking issue below, but they expressly acknowledged in their briefs that no taking claim was being pursued. Neither party attempted to make any record to support or disprove a taking claim. Nevertheless, having lost on all other grounds, landowners now assert that their previous omission "does not presently preclude this Court from determining whether a 'taking' occurred" and even suggest that the courts below had a duty to consider the takings issue sua sponte. Petition, p. 13.

Both the Ninth Circuit and landowners' former counsel understood that, since *Williamson County*, 473 U.S. 172, this Court has held that private landowners alleging a "taking" may not pursue their claim in federal courts until they have first exhausted available procedures

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[2] Somewhat inconsistently, landowners also state that their previous counsel's election not to raise a taking claim "did not stop the court below from considering the question, if in somewhat cursory fashion". (Petition, p. 13.) In fact, it is clear from the decisions published below that neither the district court nor the Ninth Circuit considered any hypothetical taking issue.

for recovering "just compensation" is state courts. 473 U.S. 172, 194-196. The rule has since been applied without question in every circuit. *Gamble*, 5 F.3d 285, 286; *Gilbert v. City of Cambridge*, 932 F.2d 51, 63-65 (1st Cir. 1991); *Southern Pacific*, 922 F.2d 498, 502-503; *Greenbriar*, 881 F.2d 1570, 1574-1575; *Estate of Himelstein v. City of Fort Wayne*, 898 F.2d 573, 575-576 (7th Cir. 1990); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 331 (6th Cir. 1990); *Austin v. City and County of Honolulu*, 840 F.2d 678, 680-681 (9th Cir. 1988).

Landowners made no attempt whatsoever to seek recovery through state courts. Since this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), 107 S.Ct. 2378, 96 L.Ed.2d 250, California courts have provided a constitutionally adequate damages remedy. *Schnuck v. City of Santa Monica*, 935 F.2d 171, 173 (9th Cir. 1991); *Sinaloa Lake Owners Assn. v. Simi Valley*, 882 F.2d 1398, 1403 (9th Cir. 1989); see *Healing v. California Coastal Commission*, 22 Cal.App.4th 1158, 1169, 27 Cal.Rptr.2d 758 (1994).

This Court has no jurisdiction to hear landowners' belated taking claim.

B. Landowners' Taking Claim Is Also Utterly Without Merit And Presents No Novel Or Important Issues Of Takings Law.

Aside from its jurisdictional problems, landowners' "taking" claim is frivolous on the merits.

Unlike *Dolan v. City of Tigard*, ___ U.S. ___, 94 Daily Journal D.A.R. 8803, and *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), this case does not involve an unconstitutional exaction or physical taking of an easement or other interest in landowners' property. This is simply a case of the property being designated in the City's general plan in a manner which is alleged to reduce its development potential and impair its market value. The general plan does not interfere at all with the historic use of the land (agriculture); it does not prevent more profitable development. The general plan permits development of approximately 83 residential units on the property. (One residence - landowners' family home — exists there now.) Landowners' own appraiser calculated the value of the 35 acres, even with all challenged City restrictions in place, as $2,400,000. 17 F.3d at 1235. Although the record does not disclose it, this value is almost certainly greater than the value if sold for its current and historic use, *i.e.*, agriculture, even if it is less than the $6,000,000 landowners claim the land would be worth if it were upzoned to suit their personal demands.

No court in modern history has suggested that a mere reduction in potential profitability of land amounts to a taking; indeed, even demonstrable reductions in market value, absent the extreme, do not constitute a taking. *Penn Central*, 438 U.S. 104, 131; *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust*, __ U.S. __, 113 S.Ct. 2264, 2290 (1993). The City respectfully suggests that this case does not justify a new or different rule.

Landowners' alternate argument is that the City at least temporarily denied them "all economically productive and beneficial use of their land" for the one-year period in which (1) the City had not adopted specific procedures for approving a specific plan on the property; and (2) the temporary "water moratorium" was in effect. The courts below found that, even if these measures did place an additional one-year hurdle in the path of development, such delays are not unreasonable. 17 F.3d at 1237; 796 F.Supp. 1325. Landowners remained free to continue farming, and, contrary to claims in the petition, actually did so by first planting crops and then leasing the land for agriculture. The family also continued to occupy a portion of the land for their residence. The courts below also found no evidence that landowners were precluded from selling the land during this period for its appraised value of $2,400,000. Instead, landowners essentially imposed their own moratorium by refusing to list or advertise the property and instructing their broker to reject any offers below the unrealistic value of $6,000,000. 17 F.3d at 1231; 796 F.Supp. at 1324. They made it clear in the record below that they have no intention of developing the land; the family's desire is merely to sell the land to a qualified developer for top dollar.

The little authority cited by landowners does not support a temporary taking claim. *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), cited at p. 12 of the petition, represents a fair statement of current law. As the court in *Tabb Lakes* noted, as long as a land use regulatory scheme permits reasonable development with appropriate permits, there is no taking. Delays in obtain-

ing necessary approvals are an inevitable and, absent extremes, permissible element of every regulatory scheme. 10 F.3d 796, 800-802, citing *Agins*, 447 U.S. 255, 263 n. 9 and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985); see also *Gilbert*, 932 F.2d 51, 56; *Landmark Land Company*, 874 F.2d 717, 721. In *Tabb Lakes*, the facts presented were far more aggravated than here. Development of the plaintiff's parcel was substantially delayed by the assertion of the permitting authority which was ultimately found to be invalid. 10 F.3d at 802-803. The City in this case did not "take" plaintiff's land by enacting a temporary moratorium on new subdivisions while its water supply problems were studied, or by delaying slightly in adopting new regulations governing specific plans.

II.

THE COURTS BELOW CORRECTLY APPLIED THE LAW IN REJECTING LANDOWNERS' SUBSTANTIVE DUE PROCESS CLAIM

Landowners briefly contend that the courts below committed a number of legal or moral errors in rejecting their substantive due process claim. None of these claims have merit.

A. The Lower Courts Correctly Applied Federal Law In Rejecting The Substantive Due Process Claim.

Landowners do not cite any substantial disagreement between the Ninth Circuit and other circuits over

the standard to be applied to substantive due process claims. Instead they cite state court decisions from a total of two states (Washington and Missouri) which purport to apply a form of balancing test in determining whether local regulatory actions violate substantive due process. *Guimont v. Clarke*, 854 P.2d 1, 121 Wash. 586 (1993), *Barber & Sons v. Jackson County*, 869 S.W.2d 113, 117 (Mo. App.W.D. 1993); *Huttig v. City of Richmond Heights*, 372 S.W.2d 833, 839 (Mo. 1963). The City is aware of no decision by this Court or any federal circuit which endorses this approach. Although the circuits apply differing verbal formulas, they all uphold governmental actions against substantive due process challenges so long as the actions substantially advance a legitimate governmental interest, are not arbitrary or capricious, and are not taken for some impermissible motive, *e.g.*, discriminatory or retaliatory motives. See, generally, *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217-1224 (6th Cir. 1992) [discussing substantive due process cases from all circuits]; see also *Pennell v. City of San Jose*, 485 U.S. 1, 11, 108 S.Ct. 849, 857, 99 L.Ed.2d 1 (1988); *Nestor Colon Medina & Sucesores, Inc. v. Custudio*, 964 F.2d 32, 45-47 (1st Cir 1992).

It is perhaps worth noting that not even the erroneous state decisions cited by landowners would support recovery on the facts of this case. In *Barber & Sons*, 869 S.W.2d 113, 117-118, the court found that reduced land value caused by the county's zoning decision was a "detriment to which this court does not afford significant weight." The land at issue was deemed worth $5,000 per acre as zoned by the county versus $48,300 per acre if rezoned as desired by the plaintiff, a ninefold

differential. In this case the land is worth $2,400,000 as zoned versus a theoretical value of $6,000,000 if rezoned as desired by landowners. Thus, even under the indulgent standards applied in Missouri, landowners plainly would have a difficult time persuading any court that the City's actions imposed an excessive private detriment.

B. The Court Below Did Not Fail To Consider Relevant Factors In Denying Landowners' Facial Substantive Due Process Claim.

Landowners' basic contention on their facial substantive due process claim is that the courts below ignored a number of allegedly relevant factors. All of landowners' points were thoroughly considered by the courts below, even those arguably irrelevant under the controlling standards. The courts below simply concluded that the claims were not only legally specious but wholly unsupported by evidence. It is, of course, a proper function of summary judgment motions to screen out such claims.

Landowners first fault the lower courts for failing to consider the "detriment" to themselves in terms of alleged loss of use of their land and reduced market value. As discussed previously, there was no loss of use. They remained free to farm or lease the land, and actually did so. They were also free to pursue development permits or sell the land for development, subject only to the City's planning requirements. With these restrictions the land retained a value of $2,400,000, or approximately $68,500 per acre, even according to petitioner's own appraiser. If this is an unconstitutional economic hardship, it is one most citizens would be willing to bear even

without compensation. Contrary to landowners' contentions, the lower courts fully considered their economic claims in determining whether their due process rights were violated. 17 F.3d at 1235; 796 F.Supp. at 1329-1330. The Court of Appeals expressly noted the difference between the property's as-is appraised value ($2,400,000) and the $6,000,000 desired by landowners. 17 F.3d at 1235-1236. The court simply concluded that this is not the type of extreme imposition which might justify a substantive due process claim.

The courts below also considered landowners' arguments regarding development delays and "lost use" of the property caused by the specific plan requirement. 17 F.3d at 1233. Applying well-settled principles, however, the courts simply found the relatively short-term delays involved were neither unreasonable nor unconstitutional given the modern realities of planning and development and so has every other court which has considered the issue, including this Court. See, *e.g.*, *Agins*, 447 U.S. 255, 263 n. 9; *Tabb Lakes*, 10 F.3d 796, 800-802 [three-year delay caused by improper assertion of regulatory authority]; *Armour and Company, Inc. v. Inver Grove Heights,*, 2 F.3d 276, 278 (1993) [alleged reduction of value and loss of ability to sell property caused by protracted redevelopment planning activities]. Landowners' situation is no different than that of virtually any large parcel owner today who would prefer to build condominiums rather than grow crops. The government does not act arbitrarily or capriciously or incur liability under the due process clause because it places reasonable limits on development, and requires planning and devel-

opment to proceed in a rational manner. The Court of Appeals in this case held no more.

C. The Lower Courts Properly Found That Landowners Failed To Produce Any Genuine Evidence Of Improper Motives.

Landowners, although having abandoned their equal protection claim, contend that the court below erred by failing to consider the possible "pretextuality of respondent decisionmakers' state of mind." Petition, p. 15. The courts below fully considered landowners' claim of pretextual motives, and found it entirely devoid of evidentiary support. Landowners attempt to recharacterize the record as containing actual evidence of improper City motives. It does not. The lower courts found the City's stated reasons for the general plan amendments and water moratorium were fully supported by facts and reason set forth in the record in lengthy declarations and the administrative record of the City's actions. There is *no* countervailing substantive evidence suggesting that a majority of the City Council members acted for any improper reason. Having failed to produce anything other than suspicion and speculation regarding alleged ulterior motives, landowners could not survive summary judgment.

D. The Courts Below Correctly Held That Landowners' "As Applied" Claim Was Not Ripe.

It is less than clear what difference it would have made even had the lower courts addressed landowners' "as applied" substantive due process claim on its merits. In any case, landowners do not appear to dispute that any

"as applied" substantive due process claim must meet the final decision requirements of *Williamson County*, 473 U.S. 172, 199-200; see also *Southern Pacific*, 922 F.2d 498, 507; *Landmark Land Company*, 874 F.2d 717, 722; *Kinzli*, 818 F.2d 1449, 1456.

In an effort to get around this particular hurdle, landowners simply recharacterize the issue and completely misstate the record. The courts below, having found the City's specific plan requirement and water moratorium *facially* valid, held that landowners must actually apply for specific plan approval before making an *as applied* attack on these regulations. 17 F.3d at 1231-1233. Landowners claimed below, and again in this Court, that it would have been futile to apply for specific plan approval because specific regulations for processing specific plan applications were not adopted until May 1991, approximately one year after the general plan was adopted. This argument misses the point.

First, landowners do not deny that an application could have been filed well before judgment was entered in this action, rendering further litigation potentially unnecessary. 17 F.3d at 1232. Second, landowners misunderstand the "futility" exception to the ripeness doctrine. The fact that an owner is required to *wait* before filing an application, at least where the period of delay is not unreasonable, does not mean that application will be futile. This Court and other courts have long recognized that some degree of delay or inconvenience adheres in every planning process and is simply one of the incidental burdens which must be born for the privilege of living in a modern society. *Agins*, 447 U.S. 255, 263 n. 9; *Gilbert*, 932 F.2d 51, 56; *Landmark Land Company*, 874 F.2d

717, 721. Landowners' claim is particularly hollow in this case; they admitted below that the family has no intention of submitting and following through on a specific plan application themselves; their real objection is merely that the specific plan requirement allegedly adversely affects the property's value.

Landowners' argument is buttressed with several gross distortions of fact. For example, they allege that "There is no question that for years prior to respondents' adoption of procedures by which landowners could supposedly apply for 'specific plans' enactment by the City Council, the Kawaokas had notified respondents of the current non-viability of agricultural uses on their property." Petition, p. 16. The "specific plan" requirement complained of did not even exist until May 1990 when the general plan was adopted. It was never previously asserted and there is *no* evidence that landowners ever advised the City that agriculture was (allegedly) no longer viable on their land before the general plan hearings. In fact, landowners or their lessees were still growing strawberries on the land when the case was heard in the Court of Appeals.

Landowners now baldly assert that a "meaningful application" was made for specific plan approval in the form of "in person contact between the Kawaokas and their representatives on the one hand, and various city representatives on the other." Petition, p. 17. This passage apparently refers to one of the few occasions in which landowners' "consultant", Bertram Johnson, made informal inquiries by telephone or at the City Planning Department counter as to how application could be made for a specific plan. That the courts below did not find

these superficial inquiries to be a "meaningful application" should come as little surprise. See *Reserve Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1381-1382 (11th Cir. 1994) [informal efforts to have permit restored insufficient to satisfy final decision ripeness requirements].

CONCLUSION

This case raises no significant issue for Supreme Court review. The petition for certiorari should be denied.

Respectfully submitted,

KATHERINE E. STONE

MYERS, WIDDERS & GIBSON

Counsel of Record for Respondents,
CITY OF ARROYO GRANDE, et al.

APPENDIX

APPENDIX

DECLARATION OF LLOYD B. ZOLA

1. I am a citizen of the United States and the State of California. I am over the age of 18 years and if called upon, could and would competently testify to the following.

QUALIFICATIONS

2. I am the founder and president of a professional planning consulting firm called Planning Network and have been so for over eight (8) years. I have been hired by the City of Arroyo Grande ("City") as an expert witness in the case of *Kingo Kawaoka v. City of Arroyo Grande*. I received my B.A. in Urban Studies in 1974 and did graduate studies in Public Administration. As president and founder of Planning Network, I employ and supervise over twenty (20) employees. I directly prepare planning studies and reports, including general plans, specific plans and environmental impact reports ("EIR"s). I am responsible for overall project strategy and quality control, design and implementation of public participation programs and making presentations before administrative and legislative bodies.

3. Prior to founding my own consulting firm, I was Director of Planning for L.D. King Engineering for three (3) years. I was responsible for preparing specific plans and EIRs. I spent the previous five (5) years as a planner for public agencies including Riverside County, San Joaquin County and the City of Concord. I prepared several General Plan elements, and reviewed and proposed comments on legislation on preserving agricultural land.

4. I have received project awards for preparing The Moreno Valley General Plan, The Foothill Boulevard Specific Plan and The East Chino Specific Plan.

5. I was also an expert witness on behalf of the Quechan Tribe of the Fort Yuma Indian Reservation in a case relating to adjudicating water rights along the Colorado River. The case included a determination of which portions reservation could be commercially farmed. A true and correct copy of my curriculum vitae is attached as Exhibit A.

THE CITY OF ARROYO GRANDE

6. The City of Arroyo Grande ("City") is located on the central coast southwest of the City of San Luis Obispo. Its population in 1988 was approximately 13,700. The entire City is 5.45 square miles. (Exhibit 3, *Existing Setting Report,* p. 102.) Arroyo Grande was historically a farming town. In 1988 there existed approximately 700 acres of land designated agriculture within the city limits. (Exhibit 5, EIR, p. 164.) Agricultural production includes row crops such as strawberries and vegetable farming. In 1988, approximately 72 acres within the City were farmed for strawberries. There are still approximately 72 acres cultivated with strawberries.

THE GENERAL PLAN UPDATE

Overview of General Planning

7. Under California law, every city is required to have a General Plan which serves as a "Constitution" for land use within the city. (Government Code § 65300.) The General Plan guides the long term physical development of the City and is comprised of goals, policies and objectives, and includes a land use diagram designating population density and building intensity. (Government Code § 65302.) There are seven (7) mandatory elements

of a General Plan (land use, housing, conservation, open space, circulation, noise and safety) and several optional elements. (Government Code § 65302.) Cities are required to update a General Plan as necessary to ensure the plan adequately addresses future land use issues. The housing element must be updated every five (5) years — Government Code § 65588.

Overview Of Arroyo Grande's General Plan Update Process

8. I was retained by the City in early 1988 to update three (3) elements of its General Plan; land use, conservation and open space. At the same time, City staff was directed to update the housing element. (Collectively these actions were known as "General Plan update".) The City's General Plan update process took place over a two (2) year period, and included the following steps:

a. Evaluating existing land uses, resource constraints and public concerns resulting in a report entitled "*Existing Setting and Community Issues Report.*"

b. Drafting three (3) land use alternative scenarios resulting in a report entitled "*Land Use Alternatives and Holding Capacity Report.*"

c. Drafting the land use, housing, open space and conservation elements of the General Plan.

d. Preparing an Environmental Impact Report ("EIR") on the General Plan update. (Public Resources Code § 21000 *et seq.*)

e. Revising the draft General Plan update per Planning Commission and City Council direction and public input.

Public Participation In The Arroyo Grande General Plan Update

9. Public participation in the General Plan update was extensive. The City notified over 5,100 people of the General Plan update, conducted an informal community opinion survey and held thirteen (13) workshops and public hearings before the Planning Commission and City Council over a two (2) year period. Early in the General Plan program, community leaders were interviewed by myself and my assistant, Mr. Kent Norton of Planning Network. Interviews consisted of one-on-one sessions with City Council members including Councilwoman Doris Olsen, one Planning Commission member, and members of the public selected by the City. I personally interviewed the Mayor and all councilmembers, including Doris Olsen. In none of the interviews were any disparaging statements against any racial group made. All of those interviewed emphasized agriculture as a major component of the City's identity, and indicated that, although it might be difficult, agricultural lands should be preserved.

10. In addition to community leader interviews, I conducted two (2), one-evening town hall meetings. During these meetings, local residents emphasized their desire to retain the City's rural, small town character and also requested that agricultural lands within and adjacent to the City be preserved. As a follow-up to community leader interviews and town hall meetings, a "Land Use Alternatives and Holding Capacity Report" ("Alternatives Report") was prepared by Planning Network under my direction. (Exhibit 4.) The report was completed on May 17, 1989. The purpose of the report was to identify the major policy choices which the City's updated General Plan would address.

11. I conducted two (2) joint workshops for the City Council and members of the City boards and commissions on June 19, 1989 and November 20, 1989. Retaining the City's rural small town character and preserving agricultural lands were identified in these workshops as important objectives for the General Plan. The workshops also resulted in a consensus to manage future population growth in a manner consistent with available resources, particularly water.

12. In other communities, I have found "agricultural preservation" to sometimes be related to a desire to slow or stop urban development rather than a desire to really preserve agriculture. In Arroyo Grande, I found this generalization to be untrue; I found that local citizens wanted to see agriculture operations continue.

13. Ten (10) public hearings were held: Five (5) before the Planning Commission on 1/2/90, 1/30/90, 2/6/90, 2/26/90, and 3/19/90; and five (5) before the City Council on 4/9/90, 4/24/90, 4/25/90, 4/30/90, and 5/22/90. I was present at the public hearings, I presented General Plan materials, answered questions and considered all testimony. Exhibits 7 and 8 are certified copies of the minutes of these meetings.

AGRICULTURAL LANDS AND THE GENERAL PLAN UPDATE

Overview

14. Agriculture has been the central historical and economic activity in Arroyo Grande since the 1840's. The nature of this resource is important when analyzing how growth and change will affect the City. (*See* Exhibit 3, *Existing Setting Report*, p. 102.) The City's previous General Plan did not contain sufficient policy direction to adequately preserve agricultural lands. (Exhibit 5, EIR, p. 169, ¶ 4.) By 1988 the City had already lost over half

of its original approximate 725 acres of prime agricultural soils to nonagricultural uses (Exhibit 3, *Existing Setting Report*, pp. 103, 104 and 106; Exhibit 5, EIR, p. 165, ¶ 1(2)). Preservation of agriculture emerged during the general plan update as one of the strongest community objectives. (Exhibit 3, *Existing Setting Report*, p. 108.)

15. The Alternatives Report identified three (3) alternatives for preserving existing agricultural land.

a. Preserve all existing agricultural land, whether or not they contain prime agricultural soils (as defined by the U.S. Soil Conservation Service).

b. Preserve agricultural lands with prime soils for agricultural use (399 acres), and allow non-prime lands to convert to low density housing.

c. Preserve certain prime agricultural lands (330 acres) by establishing selected roadways as permanent barriers to further development (Exhibit 4, Alternatives Report, pp. 123, 126, 129.)

16. The consensus among Planning Commission and City Council as expressed at their June 19, 1989 joint workshop was that agricultural lands within and adjacent to the City should be preserved to the maximum extent possible.

The Subject Property: Fifty-five (55) Acres of Strawberry Fields

17. It is my understanding that the property at issue in this lawsuit is fifty-five (55) acres of strawberry fields located on the southern border of the City ("subject property"). It is also my understanding that thirty-five (35) of these acres are held in trust for the plaintiffs, the Kawaokas ("plaintiff's property"). Plaintiffs' property is cultivated for strawberries and contains residences for the Kawaokas. The remaining three (3) properties are

cultivated for strawberries and contain commercial fruit stands. It is also my understanding that these three (3) remaining properties are owned by the Matsomotos, Tomas and Youngs. (*See* Exhibit 18, deposition excerpts of Craig Kawaoka, p. 458, line 15.)

18. At the joint public workshops, the Planning Commission and City Council leaned towards preserving the agricultural use of the subject property. They also expressed concern regarding the future viability of agriculture on the subject property. In response to these concerns, I proposed that the City add a policy (later to become Land Use Element ("LUE") Policy 1.5) which would permit the future conversion of the subject property to residential and commercial uses upon a showing that agriculture was no longer economically viable.

19. My understanding of the consensus reached by Planning Commission and City Council members at their June 19, 1989 workshop is:

a. All agricultural lands within and adjacent to the City, including the fifty-five (55) acres of subject property should be designated as Agriculture on the General Plan land use diagram.

b. It would be desirable to retain the existing agricultural uses on subject property *as long as they were viable.*

c. A determination of viability would be made at such time as a proposal to develop the subject property was brought forward to the City. This understanding is reflected in the minutes of the June 19, 1989 workshop, Exhibit 6.

20. After the June 19, 1989 workshop, Planning Network, under my direction, prepared the Land Use Element ("LUE") and Open Space and Conservation

Element. The first draft of the General Plan designated the subject property as "Agriculture" on the land use diagram and included LUE Policy 1.5 which provide that,

> "At such time as they are no longer economically viable, permit the conversion of the existing strawberry fields located south of Grand Avenue near the western city limits to urban use subject to preparation of a specific plan as set forth in Government Code Sections 65450-65457."

21. Other agricultural lands within the city were preserved and protected by requiring that all prime soils be retained as agriculture. (Exhibit 2, General Plan-LUE Policies 12, LUE, p. 14; *see* also policy 1.2, p. 14.)

Plaintiffs' Property

22. During the public hearings before the Planning Commission, plaintiffs or their representatives indicated they did not want their thirty-five (35) acres designated agriculture on the land use diagram. The Planning Commission recommended to the City Council that the agricultural designation be adopted for the plaintiffs' property, noting that proposed LUE Policy 1.5 would permit conversion to residential uses upon a showing of economic infeasibility and preparation of a specific plan.

23. At public hearings before the City Council, plaintiffs or their representatives claimed strawberry farming was not viable at the present time and requested a residential designation for the property on the land use diagram. In response to plaintiffs' request, the City Council revised the General Plan diagram to designate residential use (with a small amount of commercial use along Grand Avenue) for the fifty-five (55) acres of strawberry fields which include the Kawaoka property.

The City retained the requirement that a specific plan be prepared before residential development could occur. City Council's actions are reflected in the minutes of April 25, 1990. (Exhibit 8.)

SPECIFIC PLAN AS A PLANNING TOOL

24. A specific plan is a recognized and appropriate planning method to facilitate conversion of existing agricultural uses to other uses. Specific plans are a traditional planning tool, authorized by the State legislature over twenty-five (25) years ago (Government Code § 65450, *et seq.*). Specific plans are typically used to master plan areas with multiple parcels in separate ownership that pose common planning issues. (*See* State General Plan Guidelines, Exhibit 13, p. 373.) Specific plans specify the distribution, location and extent of land uses and essential infrastructure such as water, sewage, roads, waste disposal. (*See* Government Code § 65451.) They avoid redundant planning expenses, avoid duplication of infrastructure costs and allow for shortened environmental review. A specific plan may be prepared by either the private or public sector. (Government Code § 65450; Exhibit 13, General Plan Guidelines, p. 373.) In my experience the vast majority of specific plans are prepared by the property owners and submitted to the city for review and adoption. A description of specific plans is set forth in the General Plan Guidelines, published by the State Office of Planning and Research.

25. As early in the General Plan update process as May, 1989, in the Alternatives Report, I, along with City staff, recommended that a specific plan be prepared when the subject property converted from agriculture. In my opinion a specific plan requirement was an important planning requirement for the subject property for the following reasons:

a. All of these properties are planted in strawberries and share similar difficulties in continuing agriculture use. Developing any one of the parcels in isolation could increase the problems facing the remaining owners.

b. The fifty-five (55) acre subject property is one of the largest undeveloped sites remaining in the City. There is a need to plan roads, coordinate sewage disposal, roadways, easements, drainage, utility services and to distribute available water supplies and sewage capacity.

c. A specific plan would also address the unique problem facing the entire site, that of potential pesticide residues in the soil, resulting from a long history of pesticide and fumigant use.

d. The specific plan would provide the owners of the strawberry fields with sufficient flexibility to determine the optimal land use mix and site design at the time they were ready to convert the property from agricultural use.

26. Based upon my experience and my two (2) years of work on the Arroyo Grande General Plan update, I am of the opinion that the specific plan requirement for conversion of the strawberry fields to non-agricultural uses is appropriate; this requirement is a responsible planning strategy to facilitate conversion of the strawberry fields to a mix of residential and limited commercial uses.

RESIDENTIAL DENSITY FOR PLAINTIFFS' PROPERTY

27. Plaintiffs' property was designated heavy commercial/light industrial under the 1987 General Plan, but being cultivated for strawberries at the time of the General Plan update.

28. In keeping with plaintiffs' request for a residential designation, the City Council adopted a mixed residential designation for the plaintiffs' property. The General Plan update permits residential development on the subject property at a density of 4.5 dwelling units per acre on half of the property and one dwelling unit per acre on the other half of the property. Exhibit 1 is a copy of the General Plan land use diagram showing these designations.

29. I recommended this density because of the limitations which the City faced regarding long-term water availability. Sufficient long-term water supply was not available to the City to support buildout of the General Plan at a higher density. I believe that this density is compatible with surrounding land use densities.

30. In addition, I recommended the density which was ultimately applied to the Kawaoka property as a compromise between the density of surrounding residential lands, and the policy direction given by Planning Commission and City Council members at their June 19, 1990 workshop as to the appropriate density for existing non-prime agricultural lands (one dwelling unit per one and one-half acres). Thus, although the density assigned to the Kawaoka property was less than that of surrounding developed lands, it was greater than the density assigned by the updated General Plan land use map to other existing, non-prime agricultural lands.

31. My recommendation for a mix of residential densities was based on "averaging out" the intensity of use within the fifty-five (55) acre strawberry fields, considering the General Commercial designation assigned to the lands adjacent to Grand Avenue. In this manner, the overall intensity, projected water consumption, and

projected traffic generation of the fifty-five (55) acres would be equivalent to that of surrounding lands.

32. In recommending the density ultimately assigned to the fifty-five (55) acres of strawberry fields, I believed that the proposed density would be compatible with surrounding land use densities.

33. The mixed residential density supports several additional General Plan policies and objectives including:

Objective 2.0. Encourage residential densities, intensities, and patterns that are consistent with a rural lifestyle and image and which provide an appropriate range of housing consistent with the Arroyo Grande Housing Element. (Exhibit 2, General Plan-LUE p. 16.)

Policy 2.3. Broaden the range of, and encourage innovation in, available housing types, provide housing for those not desiring dwellings on individual parcels, those desiring a mobilehome lifestyle, as well as for those desiring amenities not generally found in small town subdivisions, such as common open space and recreational areas. (Exhibit 2, General Plan-LUE p. 17.)

Policy 8.1. Limit the intensity of land use and area population to that which can be supported by the area's resource base, as well as circulation and infrastructure systems. (Exhibit 2, General Plan-LUE, p. 38.)

WATER CONSTRAINTS

34. As part of my duties in preparing the General Plan update and EIR, I reviewed reports and studies on the City's water supply. I concluded that the City did not have enough water available to accommodate maximum buildout under the then existing General Plan.

35. The City's total annual water supply was estimated under the General Plan update as follows:

1,202 acre feet of groundwater from the local groundwater basin (based upon an informal agreement with surrounding communities and districts)

2,290 acre feet from Lopez Lake (based upon a formal adjudication)

3,492 Total Acre Feet

(*See* Exhibit 3, Existing Setting Report, p. 111; *See* Exhibit 5, EIR, p. 166-167.)

36. Based upon an average daily per capita water consumption of 190 gallons, the EIR concluded the City's water supplies could only support a population of 16,800. The EIR concluded the City would already have a population of approximately 16,500 by April 1989 if all homes were occupied (including approved units). (Exhibit 5, EIR, pp. 166-167.) The previous General Plan had planned for a maximum population of 24,000. (Exhibit 5, EIR, p. 166.)

37. It was clear that the General Plan update would need to reflect a reduction in population growth. I recommended overall density reductions throughout the City as a means of addressing the water shortage.

38. The resulting General Plan update contains a level of growth that is nineteen percent (19%) less than the previous General Plan. (Exhibit 5, EIR, p. 167.) Even so, projected buildout of approximately 19,500 population is estimated to exceed the available water supply by approximately 656 acre feet a year. (Exhibit

5, EIR pp. 166-167.) The City adopted mitigation measures and policies to minimize the projected water shortage as part of the General Plan update. (Exhibit 5, EIR, p. 168.) The City Council also adopted Interim Urgency Ordinance No. 421 C.S., temporarily suspending certain development applications including lot splits and/or second units. (Exhibit 12, Ordinance 421 C.S.; Exhibit 6, minutes of City Council hearing of May 22, 1990.) Ordinance No. 421 C.S. states the potential existed that the City water supply would be exhausted and overtaxed and there existed a current, immediate and continuing threat to the public health, safety or welfare if land divisions, rezoning and second units continued to be approved. Ordinance No. 421 C.S. was extended by Ordinance No. 423 C.S. (Exhibit 12), which expired in May, 1991.

39. Based on my experience and expertise and specifically my two (2) years work on the General Plan for the City of Arroyo Grande, it is my opinion that the General Plan land use, open space and conservation elements prepared under my direction fully comply with state law and are consistent with and reflect community desires that were expressed during the General Plan update including the need to preserve agricultural lands to the maximum extent feasible and to manage future growth in keeping with resource constraints.

I declare under penalty of perjury that the foregoing is true and correct and is of my own personal knowledge, that if called to testify I could and would competently testify to the same, and that this declaration, was

executed this _____ day of November 1991, at _____, California.

Original signed

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9105 Sunset Boulevard, West Hollywood, California 90069; that on August 16, 1994, I served the within *Opposition To Petition For Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(*By Express Mail: Original and 40 Copies*)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
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San Francisco, CA 94119-3939

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 16, 1994, Los Angeles, California.

Betty J. Malloy
(*Original Signed*)